

United States International Trade Commission
Washington, DC

Guide to Rulemaking

I. Introduction

This guide describes the procedures and policies the International Trade Commission (Commission) uses in drafting rules that will become part of the Commission's Rules of Practice and Procedure (Rules). Rulemaking as used in this guide includes drafting new rules as well as amendment, revision, reservation, and removal of existing rules. The Commission's Rules are codified in title 19 of the Code of Federal Regulations, Parts 200-213 (19 C.F.R. Parts 200-213), and contain the following parts:

200 Employee responsibilities and conduct
201 Rules of general application
202 Investigations of costs of production
204 Investigations of effects of imports on agricultural programs
205 Investigations to determine the probable economic effect on the economy of the United States of proposed modifications of duties or of any barrier to (or other distortion of) international trade or of taking retaliatory actions to obtain the elimination of unjustifiable or unreasonable foreign acts or policies which restrict U. S. commerce
206 Investigations relating to global and bilateral safeguard actions, market disruption, trade diversion, and review of relief actions
207 Investigations of whether injury to domestic industries results from imports sold at less than fair value or from subsidized exports to the United States
210 Adjudication and Enforcement
212 Implementation of the Equal Access to Justice Act
213 Trade remedy assistance

The guide does not address the creation of internal agency rules; with respect to that issue, see USITC Directive 0001.4, System of Internal Rules (June 1, 1998).

The Commission's organic statute, at 19 U.S.C. § 1335, provides: "The commission is authorized to adopt such reasonable procedures and rules and regulations as it deems necessary to carry out its functions and duties." The nature of the Commission determines the nature of Commission rulemakings. As an independent, quasi-adjudicative agency, the Commission promulgates only procedural rules, and engages in rulemaking only rarely. This is in contrast to the practice of certain other agencies, which publish substantive rules -- such as those regulating products or commerce -- on a frequent basis. Because of its independent status and the nature of its rulemakings, the Commission is not always legally bound by statutes and other issuances concerning rulemaking. In particular, many issuances focus on substantive rules, and therefore have little relevance to Commission rulemakings. However, the Commission normally acts consistent with such issuances to promote good government. Notably, the Commission's usual practice is to seek public comment on its proposed rulemakings and -- time permitting -- interim rulemakings, whether or not it is required.

II. Types of rulemaking notices

When making a change to its Rules, the Commission makes use of one of a number of different types of notices. Which type is chosen depends on the circumstances of the rulemaking.

The Commission normally conducts rulemaking consistent with the Administrative Procedure Act (APA), particularly 5 U.S.C. § 553. Under the APA scheme, an agency effects rulemaking by publishing a series of notices in the Federal Register. First, an agency publishes in the Federal Register a notice of proposed rulemaking (NPRM) seeking public comment on a set of proposed rules. The Commission normally gives the public either 30, 60, or 90 days to comment, but may choose another time period in appropriate circumstances. Factors to consider in determining how long a comment period to specify include whether the agency has a statutory or other deadline for promulgating the rules, and the nature and complexity of the proposed rules.

Once the Commission has received public comments -- or, as often happens, no comments are received by the deadline -- the Commission publishes a notice of final rulemaking (NOFR) that addresses any comments and sets out the final version of the rules. The office originating an NOFR should consult both the Office of the Secretary and the Web site <http://www.regulations.gov> to insure that all comments have been identified. The rules normally become effective 30 days after publication of the NOFR. On occasion, the Commission may choose to terminate a rulemaking prior to the NOFR stage, and normally will publish a notice to that effect.

Although the APA only explicitly discusses the two types of rulemaking notice described above, the Commission has successfully used a third type of notice. The notice of interim rulemaking (IFR) publishes rules that become effective immediately and calls for public comment on those rules. The Commission uses the IFR to address situations such as the enactment of a statute that requires rulemaking on an expedited basis. The Commission normally will publish an NOFR at a later date, taking into account any public comments received and setting out the final version of the rules that were issued on an interim basis. However, the Commission also may publish revised or amended interim rules before issuing final rules.

The Commission may consider publishing other types of notice, although it has done so only rarely in the past. The “advanced notice of proposed rulemaking” seeks public comment on issues relating to the Commission’s Rules. An NOFR can be published with respect to rules that were not previously subject to an NPRM if such rules are exempt from the APA’s notice requirements. Although the Commission’s rulemakings normally are exempt, the Commission traditionally has chosen to follow the normal NPRM/NOFR process.

In addition to publishing a rulemaking notice, the Commission may hold a hearing to hear testimony concerning the rulemaking. The Commission also may publish a notice waiving, pursuant to 19 C.F.R. §201.4(b), application of a particular rule or rules.

As discussed above, the Commission publishes each type of rulemaking notice in the Federal Register. In addition, the Commission posts all notices of rulemaking on its Web site (<http://www.usitc.gov>).

III. Drafting the notice

Regardless of which type of notice is chosen, the Office of the Federal Register (OFR) will publish it only if it complies with specific format requirements. The OFR has prepared a Document Drafting Handbook that sets out these requirements in detail, and posted it on its Web site, at http://www.archives.gov/federal_register/document_drafting_handbook/document_drafting_handbook.html.

A rulemaking notice essentially comprises the text of rules being issued and a regulatory preamble. If the proposed rules published in an NPRM are being finalized in an NOFR without change, the NOFR need not include the text of the rules. This can be a cost-saving measure if the rules are lengthy. Each notice must include a preamble that fully complies with the OFR Handbook.

In preparing a rulemaking, the drafter needs to consider which parts of the Commission's rules it will affect. Changing a rule in 19 C.F.R. Part 207, governing antidumping and countervailing duty investigations, may affect Part 201, covering investigation procedures generally.

A Government initiative seeks to have agencies put their rules in "plain language" and in question-and-answer format. However, the Commission's rules are not a good candidate for such a revision, because they are in the nature of judicial rules and use a similar format and because of the sophisticated nature of the audience (mostly attorneys and other professionals) for the rules.

IV. Regulatory analysis

Aside from the APA, a number of statutes, Executive Orders, and other issuances provide for agencies to take certain actions when they make rules. The Commission's rulemakings normally include a section that analyzes the rules changes in light of these issuances. Because of the nature of the Commission and of its rulemakings, the analyses tend to be summary.

1. The Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601 *et seq.*, provides for an agency to conduct a regulatory flexibility analysis when publishing rulemaking notices, to determine whether the rulemakings have a significant economic impact on a substantial number of small entities (*i.e.*, small businesses, small organizations, and local governments). Executive Order 13272 calls on agencies to comply with the RFA.

The office originating a draft notice of rulemaking shall take into account the provisions of the RFA. In determining what impact the RFA may have on a rulemaking, the originating office shall consider a guide provided by the Small Business Administration, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, set out at <http://www.sba.gov/advo/laws/rfaguide.pdf>.

The following is a paragraph from a previous Commission rulemaking that addresses the RFA. A drafter will need to consider whether this language is appropriate for a particular rulemaking:

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is inapplicable to this rulemaking because it is not one for which a notice of proposed rulemaking is required under 5 U.S.C. 553(b) or any other statute. Although the Commission has chosen to publish a notice, these proposed amendments are "agency rules of procedure and practice," and thus are exempt from the notice requirement imposed by 5 U.S.C. 553(b).

Consistent with the RFA, the Commission normally transmits a copy of each notice of rulemaking to the Office of the Chief Counsel for Advocacy at the Small Business Administration.

2. Executive Order 12866 (58 FR 51735, Oct. 4, 1993) calls for an agency to conduct certain analyses with respect to each rulemaking. The following is language used in previous Commission rulemakings:

The Commission has determined that these proposed amendments do not meet the criteria

described in section 3(f) of Executive Order 12866 (58 FR 51735, Oct. 4, 1993) and thus do not constitute a significant regulatory action for purposes of the Executive Order.

3. Executive Order 13132 (64 FR 43255, Aug. 4, 1999) provides for an agency to examine the federalism implications of each rulemaking. The following is language used in previous Commission rulemakings:

These proposed amendments do not contain federalism implications warranting the preparation of a federalism summary impact statement pursuant to Executive Order 13132 (64 FR 43255, Aug. 4, 1999).

4. The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 et. seq.) calls on an agency to analyze the impact of each rulemaking on the private sector and State, local, and tribal governments. The following language was used in previous Commission rulemakings:

No actions are necessary under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 et. seq.) because the proposed amendments will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and will not significantly or uniquely affect small governments.

5. The Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et. seq.) provides for agencies to provide a report on each rulemaking to a number of entities. The following language was used in previous Commission rulemakings:

The proposed amendments are not major rules as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et. seq.). Moreover, they are exempt from the reporting requirements of the Act because they concern rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

6. The Paperwork Reduction Act (44 U.S.C. 3501 et. seq.) requires agencies to seek Office of Management and Budget approval when rulemakings include new information collection requirements. The following language was used in previous Commission rulemakings:

The proposed amendments are not subject to § 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 et. seq.), since they do not contain any new information collection requirements.

V. Approval and publication

A Commission office that seeks to have a notice of rulemaking published must obtain the Commission's approval, pursuant to 19 C.F.R. § 201.4(b). Before seeking that approval, the originating office should consult with other offices, as appropriate, to obtain their input. Pursuant to USITC Directive 1704.0, Review of Legislation and Regulations (May 29, 1998), originating offices must submit all notices of rulemaking to the Office of the Inspector General for review and comment.

Once all staff office comments have been taken into account, the originating office submits the notice of rulemaking to the Commission for approval. Because the OFR often proposes nonsubstantive

changes to rulemaking notices prior to publication, the originating office should ask the Commission to approve the rulemaking notice subject to any nonsubstantive changes proposed by the OFR.

Once the Commission has approved a notice of rulemaking, the originating office should send the finalized notice to the Office of the Secretary, using a procedure approved by that office. Once the Secretary has signed the notice, her office will transmit the notice to the Federal Register for publication. As discussed above, the OFR likely will propose changes to the notice. Normally, these changes will be minor and nonsubstantive. If they are significant, the drafter may need to seek approval from the Commission to make the changes.

When the notice appears in the Federal Register, the originating office should review it for accuracy. Any errors should be reported promptly to the OFR. If errors are reported in the manner and within the time specified in the Document Drafting Handbook, the OFR will publish a corrected notice. If errors are reported after that time, the Commission will need to prepare and pay for the publication of a corrected notice.